

EXHIBIT H

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

WAYNE BERRY, A HAWAII CITIZEN,) CIVIL NO. 03-00385SOM
Plaintiff,)
vs.)
HAWAII EXPRESS SERVICE, INC.,) - VOLUME 6 -
a CALIFORNIA CORPORATION, et al.,)
Defendants.)

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for hearing on
Tuesday, March 7, 2006, at 9:05 a.m., at Honolulu, Hawaii,

BEFORE: THE HONORABLE SUSAN OKI MOLLWAY
United States District Judge

REPORTED BY: STEPHEN B. PLATT, RMR, CRR
Official U.S. District Court Reporter

APPEARANCES: TIMOTHY J. HOGAN, ESQ.
WESLEY W. ICHIDA, ESQ.
Lynch Ichida Thompson Kim & Hirota
1132 Bishop Street, Suite 1405
Honolulu, Hawaii 96813

Attorneys for the Plaintiff

MICHAEL E. BAUMANN, ESQ.
DAMIAN D. CAPOZZOLA, ESQ.
Kirkland & Ellis, LLP
777 South Figueroa Street
Los Angeles, California 90017

Attorneys for Defendant
Post-Confirmation Trust

1 I will tell you that if you do have a question, it's
2 often the case that we cannot answer instantaneously. I have
3 to contact the attorneys. I or they may be involved in some
4 other proceeding that would have to be interrupted, and it may
5 take us some time to get back to you.

6 So don't think we are ignoring your question if
7 there should be a gap between when you send out a question and
8 you get a response.

9 THE CLERK: All rise.

10 (The jury retired to commence
11 their deliberations at 9:30 a.m.)

12 (The following proceedings were held in
13 Open court, outside the presence of the jury:)

14 THE COURT: Okay, you can be seated.

15 We're going to move to the motion for preliminary
16 injunction -- I'm sorry, permanent injunction.

17 (Mr. Smith joined defense counsel
18 at defense counsel table.)

19 THE COURT: I see we have Mr. Smith back. I take it
20 he's all excited about arguing this motion.

21 MR. SMITH: Thank you, Your Honor.

22 THE COURT: Okay, so he's joined us in this hearing.

23 And I will turn to Mr. Hogan. I'll tell you what I
24 am -- I'm probably going to take this under advisement, but
25 let me go ahead and invite you.

1 MR. HOGAN: Thank you, Your Honor.

2 MR. ICHIDA: Your Honor, may I excuse myself for
3 this portion of the trial?

4 THE COURT: I think you are essential to every
5 aspect of this case...

6 (Laughter in the courtroom.)

7 THE COURT: And if you leave, we will not be able to
8 proceed, I'm certain...

9 MR. ICHIDA: Thank you.

10 THE COURT: I will see you later.

11 (Mr. Ichida was excused at 9:32 a.m.)

12 MR. HOGAN: Thank you, Your Honor. I'm sorry for
13 the interlude.

14 This case -- these infringements, Your Honor, have
15 been going on up until June 9th for a period of nearly four
16 years, Your Honor. We have already obtained -- the court has
17 already signed an injunction regarding the Hawaiian Express.
18 Who have stipulated essentially to a consent decree. So as to
19 whether there is an injunction in the case, that's already
20 passed, and we are down the road, Your Honor. And we have a
21 final permanent injunction in regard to Hawaiian Express.

22 THE COURT: That was by stipulation.

23 MR. HOGAN: By stipulation. But it still maintains
24 jurisdiction in this court regarding the conduct of some of
25 the players in the case.

1 My fervent hope is, Your Honor, this is the last of
2 the Berry litigation. What I fear is, Your Honor, is that
3 there was, I think, a belief that developed throughout the
4 time that the employees worked for API, translated over to
5 Fleming, and my fear is, during C & S, that they have an
6 entitlement to the Berry technology; that they are allowed to
7 use it because they were there when it was either put in the
8 API computers, or something of that sort, Your Honor. And the
9 fear is that at some point someone will not understand the
10 severity of continued use, or the attempt to recreate the
11 software, and once again begin to use it -- either recreate it
12 or find a copy, or something of that sort, Your Honor, and
13 thereby expose not only Mr. Berry to the injuries that we have
14 already seen what that is all about in this trial that we have
15 just completed, Your Honor, but also, the other employees.

16 And I think the court -- I think, looking at it --
17 and the court balances things at this stage, I believe. You
18 know, it's an equitable remedy. The court has almost the
19 ecclesiastic powers that the court is sitting with now, as to
20 what is the right thing to do.

21 And, clearly, the discretion that's been given to
22 the court in these areas is rarely overturned, and it really
23 comes down to what is -- we know, for Mr. Berry, he's made the
24 prayer that he get the injunction.

25 Turning to the other side, I can't imagine that any

1 of the line employees would want to be in a world in which
2 Mark Dillon is recreating Mr. Berry's software again and
3 putting it on their computers without their knowledge. The
4 court has already ruled that inadvertent is still an
5 infringement. So unless Mr. Dillon is finally convinced that
6 he cannot -- he has no rights in any of this software,
7 personally. He has no ability to recreate it.

8 If I were to put Mr. Dillon on the stand,
9 Your Honor, I would proffer this: That he has testified in
10 deposition that he can recreate it in a week. And I would put
11 him on briefly and make that proffer, Your Honor.

12 In that world, Your Honor -- and the idea of
13 subliminal copyright infringement, and all the things there,
14 that there really has to be, I think, from the court -- if the
15 court doesn't say, you can't do that anymore, that will send
16 the message "you can."

17 And I would also state, Your Honor, that I would put
18 Mr. Berry on and proffer that his market, presently -- he is
19 developing software that creates tremendous efficiencies in
20 this area, and that he should never have to compete with his
21 own work through an unlicensed user. And that his work will
22 be shared with anyone who wants to license it? It's out there
23 now running in a small company that is moving along and going
24 forward. He's working with the ocean carrier. And the
25 idea -- I know everyone's saying, well, Mr. Hogan and

1 Mr. Berry will create mischief, Your Honor. The major player,
2 market participant with Mr. Berry, is that same company we
3 sued -- or we were counter claimed against in the 1998. It's
4 now Horizon Lines. Mr. Berry, if he were to testify, would
5 proffer that he would get on the stand and say that he is on
6 line with their developers working out the next generation of
7 Homeland Security-related freight logistics software that will
8 be available to everyone.

9 If his market is impeded because copies remain in
10 the wild -- even if they don't put it on line. We have seen a
11 copy, a wild copy, not covered by any order that has popped up
12 in this case. There's so many copies out there, the fear is
13 they will continue to pop up.

14 I put in the record, Your Honor, the idea that in
15 this bankruptcy context, where is the software? I think I put
16 in the record evidence that under the plan of reorganization,
17 it was given to Core-Mark. Core-Mark is operating. Core-Mark
18 is advertising logistics services. And Core-Mark threatens
19 Mr. Berry 's copyright if they have a copy, or if they can
20 pull one out, if they can get -- when the Guidance materials
21 are one day released, I think as a matter of law they will go
22 to Core-Mark as the recipient of all the debtors' property
23 that wasn't otherwise given back to secured creditors or
24 otherwise disposed of.

25 So we have asked for two remedies, Your Honor, the

1 first being an injunction against any further infringements.
2 This would be -- I believe there's evidence that he's still
3 threatened by the potential use of his software, by Mr. Dillon
4 being able to recreate it, by the numerous copies. And I
5 brought a copy of Mr. Walker's declaration that was filed
6 earlier, supplement of his supplemental reports, listing 800
7 or more copies of databases that were in the Guidance
8 materials.

9 In my understanding of the rights that Fleming had,
10 even if they didn't infringe, they never had a right to make
11 800 copies of databases. And that massive amount of wild
12 copies of this work, a vertical work -- not just copies of
13 Windows that Microsoft could say, well, at least they don't
14 threaten my market that much because everybody needs a copy of
15 Windows. Mr. Berry's is vertical, which means that any
16 company that gets it could give it to their developer, reverse
17 engineer it, and then come out with their own work. That's a
18 significant threat to a single individual person. He's not a
19 big company, he is just a guy who works on his own. To have
20 something that's valuable -- we have seen the testimony: They
21 couldn't turn off the light; they couldn't go down and kill
22 it. That level -- we don't want to put anyone in a position
23 where someday they say, well, gee, I don't think anybody would
24 really mind if we just looked at Berry's work and maybe run a
25 couple reports off of it. Maybe we do something that helps us

1 get by today.

2 If they have been enjoined, and if all copies have
3 been accounted for and gathered up and given back to Mr. Berry
4 or disposed of, as the court would order, his market is then
5 secure, it is protected by this court. And I talked about in
6 my closing the protections. You know, the jury is now out
7 doing their functions. This is as much a part of it. And
8 there were times, Your Honor, where this is what, really, all
9 we were after in this case, is to stop the infringement.

10 And what we really don't ever want to do is have to
11 come back to this court again, and -- it's very burdensome,
12 not only on Mr. Berry and on me, but on this court, on this
13 system here, on the District of Hawaii. I look in my office,
14 I can't imagine how much work has gone into this case from
15 Your Honor, your staff. Just focus it now to say, let's not
16 do that again.

17 And if there is a problem, Your Honor is absolutely
18 the most -- you have taken this case in, you are knowledgeable
19 with it. If there is an issue, the manner in which we treated
20 HEx -- run into court right away -- it's essentially -- let's
21 talk. Let's do 30 days before anybody does anything.

22 I think that's the way to go in a case like this.
23 If there is any evidence that, say, you know, there is a
24 belief that there may be a violation, rather than run into
25 court and gin up the machine again, that we have a mechanism.

1 And I think it's appropriate in Hawaii for people to try to
2 work it out.

3 I think the alternative dispute resolution things
4 that are now part of our lives in federal court, Your Honor,
5 can work in an injunction, that we don't have to burden the
6 court right away. And that's how we did it with HEx.

7 I mean, we didn't do anything to HEx since they
8 agreed to that. We agreed that we would work together. We
9 are hoping to resolve it entirely at this point, Your Honor,
10 not piecemeal.

11 The number of works that have been created of
12 Mr. Berry's is mind-numbing. There's only one licensed copy
13 that ever existed, and it died sometime in January of 2000.
14 And from that point on, hundreds and hundreds of copies were
15 created without any care or concern for the violations of the
16 Copyright Act.

17 We use the term piracy. They are not selling it at
18 the swap meet, but in some ways it's even more -- it's more
19 serious, because it's a business. Instead of deciding to
20 either take Mr. Berry and become a partner with him -- which
21 is what I think the law says you should -- or get somebody way
22 away from this thing to recreate the database -- the court has
23 ruled the spreadsheets do not violate the copyright, and
24 that's the law of this case when it's ended, Your Honor. They
25 can operate that, and that will be it.

1 But what we fear is that these wild copies of the
2 database will reappear, either through Mr. Dillon's recreation
3 of them -- and as I said, I can proffer that and put that
4 forward -- or otherwise. Copies that were left at home.
5 Copies we have seen, even attorneys who are large law firms
6 who have, I believe, very sophisticated litigation indexing
7 systems didn't remember that there was a copy of the software
8 somewhere in Chicago.

9 I think when diligence -- an injunction is the
10 ultimate directive to be diligent. And if the court were to
11 do that and caution that it's not intended to harm anybody --
12 the PCT claims they're out of business. They can't claim any
13 harm from that. The employees never had a right to have it
14 independently anyway. And in a sense, the employees will be
15 benefited by an injunction, because it will put the onus on
16 their employer and anyone else who might seek to once again
17 pop out a copy of the Berry database, that they would be
18 violating this court's injunction, and that would be a bad
19 thing to do.

20 For Mr. Berry and for his market, Your Honor, he
21 should be allowed to move forward free of the competition from
22 an illegal copy of his own work. I've put it all on the
23 record, Your Honor. You have been very patient, and you have
24 listened, and I think you understand it. I am hoping that
25 this is my last trip in here on this matter. My fear is that

1 without an injunction, it's just going to be known as "Berry
2 Two."

3 THE COURT: Okay, thank you.

4 MR. HOGAN: Thank you.

5 THE COURT: Who is going to argue for the defense?

6 MR. SMITH: Your Honor, I would like to speak on
7 behalf of C & S. Mr. Capozzola will speak for the PCT. And
8 Mr. Hosoda, I think, has some things to say on behalf of the
9 employees, as well.

10 Your Honor, we are here in a courtroom. We deal in
11 evidence. There is no evidence that C & S ever possessed any
12 copy of 1993 FCS, or whatever it's called. There isn't -- the
13 court's already ruled C & S did not infringe 1993 FCS. The
14 court has ruled that the individual defendants did not
15 infringe at any time while they were C & S employees, which is
16 almost three years now.

17 We submit, Your Honor, that there is no basis for an
18 injunction, given the fact that there's not even any evidence
19 before the court that we even possess the work that Mr. Hogan
20 wants us enjoined from infringing.

21 We couldn't infringe it if we wanted to because we
22 do not have it.

23 What this case is really about, Your Honor, is --
24 you heard Mr. Hogan refer to "subliminal copyright
25 infringement." What this is really about is, if Mark Dillon

1 creates his own work, somebody's going to claim -- or at least
2 wants the ability to claim that it infringes. And -- because
3 he subliminally copied something that Mr. Berry authored
4 previously. And what this really is about is unbalancing the
5 playing field so that we are here on the next proceeding, in a
6 contempt proceeding, rather than in a copyright infringement
7 action.

8 And I submit to you that the injunction motion is
9 not the proper way, in this case, on these facts, because
10 there simply is no -- there's no finding that we have
11 infringed in the past, and there's no indications or
12 potential -- no evidence of any potential for infringement in
13 the future.

14 Mr. Hogan makes reference to the Guidance images.
15 C & S has no claim to the Guidance images. Those were sent to
16 Guidance specifically for the purpose of making sure that they
17 weren't in Fleming's possession. And I assume that PCT will
18 tell you that whenever this case is concluded, there's no
19 problem having them destroyed.

20 The court has made rulings relating to fair use in
21 connection with defending oneself from litigation. I
22 anticipate that there may -- the plaintiff may well appeal
23 this case, in which case we are going to need to hold on to
24 copies of certain things until the case is resolved.

25 THE COURT: I don't know, we will see what the

1 verdict is.

2 MR. SMITH: Well, at whatever point --

3 THE COURT: Somebody may appeal.

4 MR. SMITH: On behalf of C & S, let me just state
5 that we certainly have no problem with the Guidance images
6 being destroyed. C & S does have concerns about its
7 proprietary data, or its predecessor's proprietary data
8 relating to the Hawaii operation being in the possession of
9 Mr. Berry and Mr. Hogan. But we certainly don't have a
10 problem with them being destroyed.

11 And, as I say, it's in Guidance's possession
12 specifically because we are -- it was put there because we
13 didn't want the people in Kapolei to have Access to it. So
14 that's the way that was treated.

15 To the extent that what's on the Guidance images is
16 somebody's concern, that's controlled, first by the protective
17 order, as far as what's been produced to the lawyers in this
18 case -- and even that, I think, is attorney eyes only, so the
19 clients have not been allowed to see it; and, secondly, by the
20 fact that it can be destroyed at the conclusion of the case.

21 Mr. Hogan made reference to "wild copies." Once
22 again, Your Honor, I ask you to consider the evidence in the
23 record. There is no evidence that C & S has any "wild copy"
24 of anything. Certainly not of anything that's the subject of
25 this case.

1 Mr. Hogan refers to "multiple works." The copyright
2 law requires that the plaintiff register a copyright as a
3 prerequisite to filing a lawsuit. I don't know what these
4 other multiple works are, but the only registered work that's
5 the subject of this complaint is the 1993 FCS. So whatever
6 other multiple works are being discussed here certainly are
7 not properly before this court.

8 For all of those reasons, Your Honor, we submit that
9 C & S should not be subjected to any injunction, nor should
10 its employees.

11 THE COURT: Thank you.

12 MR. CAPOZZOLA: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MR. CAPOZZOLA: Damian Capozzola for the PCT.

15 Keep in mind that permanent injunction is a harsh
16 and drastic remedy, and the plaintiff has to show a threat of
17 continuing violations. In this case, the parties are
18 adjudicated inadvertent infringers. So the presumption should
19 be, from the beginning, that nobody is going to intend to or
20 try to continue to infringe on Mr. Berry's software.

21 I'll get to the substance in a minute, but on the --
22 just on the process, if this court is inclined to do anything
23 other than deny the motion, the PCT would request additional
24 briefing, because in his reply, Mr. Berry has popped up with a
25 brand new motion against the PCT. His moving papers were all

1 about the idea that the PCT is still in business, there are
2 milk cartons with Fleming information on them, etc., etc.

3 We destroyed that in our opposition. And in his
4 reply, he didn't really even make much of a token effort to
5 defend that. Instead, he comes forward with a whole bunch of
6 new allegations against Core-Mark and, as I will show you in a
7 second, misinterpretations of the bankruptcy plan and how
8 things are operating. So, just on that process alone, we feel
9 like we are entitled to additional briefing if you are going
10 to do anything other than deny.

11 On the substance of it, quite frankly, Your Honor,
12 Mr. Hogan just has it wrong. And I've got documents here, if
13 you want to get into it, I've got excerpts from the
14 confirmation order, the plan, and the disclosure statement
15 that he's just wrong about what PCT's liabilities are and what
16 Core-Mark's assets are. And, additionally, the idea that
17 Core-Mark is getting the Guidance Software has no basis in
18 evidence or in reason, and the court should ignore it.

19 I'll also tell the court that Mr. Hogan did not give
20 you the whole story when he showed you his July 26, 2004,
21 order. That order was modified by a stipulation that was then
22 entered by an order in August by the bankruptcy court,
23 basically making clear that all Mr. Hogan has is an order
24 permitting him to prosecute his pre-petition case to some sort
25 of monetary amount and then take it back to the bankruptcy

1 court, and the parties will argue whether that's an unsecured
2 claim or not.

3 The idea that he somehow gets to turn that into
4 chasing Core-Mark defies logic and reason, and it's not
5 supported. And, again, this is just not the proper way to tee
6 up the complicated bankruptcy plan issues that he's raised.
7 If he wants to move against or sue Core-Mark, then do that.
8 Until such time there is no basis to grant an injunction
9 against the PCT, based upon whatever Core-Mark's liability may
10 or may not be.

11 And I would note that the fact that he hasn't moved
12 against Core-Mark or sued Core-Mark suggests he knows he has
13 no jurisdiction over Core-Mark, at least in connection with
14 this case -- bolstering our position that Core-Mark and the
15 PCT are separate.

16 I would also point out that he is just flat wrong in
17 his reply at Page Four, saying Core-Mark is wholesale.

18 Core-Mark does convenience. Wholesale being produce,
19 convenience being cigarettes, by way of example. Core-Mark
20 and Fleming were completely different animals, which is part
21 of the reason why Core-Mark came out of the reorganization the
22 way it did.

23 I would echo Mr. Smith's comments that the orders
24 that are in place are already adequate. There is already a
25 protective order governing the disposition of Mr. Berry's

1 software. There is already an order governing the Guidance
2 materials and how those are supposed to be basically covered
3 by the protective order. The law doesn't do useless things,
4 and there are already orders in place protecting Mr. Berry.

5 Additionally, I would also urge the court to note
6 that any injunction at this point to return software would be
7 premature, unless and until this case is absolutely over. We
8 may need access to these materials to defend ourselves, or for
9 other purposes consistent with fair use until the day comes
10 when this is finally over.

11 Finally, I would just echo Mr. Smith's comments that
12 an injunction would be very prejudicial to the PCT, and to all
13 the defendants. We should not have to appear before you the
14 next time these guys get a wild idea in their head that
15 somebody's done something wrong with our backs up against the
16 wall for contempt sanctions. There is no basis for doing
17 that, and I would urge the court to deny the injunction
18 motion.

19 THE COURT: Okay.

20 MR. HOSODA: Good morning, Your Honor.

21 THE COURT: Good morning.

22 MR. HOSODA: It actually appears to me that we are
23 in agreement, at least with respect to what the law is on this
24 permanent injunction. And it's given by the MAI Systems Corp
25 case. And it's that in order to find or rule that there is a

1 permanent injunction, that the Ninth Circuit requires, one, a
2 showing of viability -- that liable's been established -- and
3 two, that there is a continuing -- there is a threat of
4 continuing violations.

5 Well, as of February 24th of this year, Melvin
6 Ponce, my -- one of my defendants, is no longer with C & S.
7 He has a child that's -- has challenges, and he cannot work.
8 His family needs him. So he is not in the logistics business.
9 There is no threat at all of him -- he's not even doing any
10 work for anybody, at all.

11 Sonia Purdy, as you heard her testimony, Your Honor,
12 is with Cardinal, and they don't do freight logistics. She is
13 not in the freight logistics department. She has been with
14 them a number of years now. So there's no continuing threat
15 of her being involved at all with freight logistics, or
16 anything to do with Mr. Berry's software. Justin Fukumoto is
17 with a CPA firm, Your Honor. He also has nothing to do with
18 the freight logistics or the system.

19 So, with respect to those individuals, there is no
20 threat of continuing violations.

21 I would like to go back to where the court was with
22 the motions for summary judgment, because many of the
23 arguments that were incorporated into this motion were made
24 and previously defeated. As you will recall, Mark Dillon
25 testified before Your Honor, and it was upon his testimony --

1 and you have said it many times, that -- he testified before
2 you, his testimony was trustworthy, you found him credible.
3 And as a result of that, it was found and determined to be an
4 inadvertent, unintentional infringement.

5 Your Honor, you have seen these employees. They
6 don't -- Mr. Hogan said that Mr. Dillon has no right to
7 Mr. Berry's copyrighted software. Mr. Dillon knows that.
8 Quite frankly, neither Mr. Dillon nor any of the rest of the
9 former employees want anything to do with in any way
10 Mr. Berry's software. I can't make it more clear. As of the
11 time that they understood that the jury verdict came back in
12 the previous hearing, they wanted nothing to do with
13 Mr. Berry.

14 All of the attempts that you heard about from
15 Mr. Dillon were to get off of Mr. Berry's system and to get
16 away from it. And that's why Your Honor found inadvertence.
17 And I would incorporate Mr. Capozzola's comments with respect
18 to the finding of inadvertence shows exactly why a permanent
19 injunction should not be issued here.

20 I heard from Mr. Hogan, also, plaintiff's counsel,
21 that "all we wanted was an injunction from the beginning."
22 Your Honor, that's not correct, and that's not what the record
23 says. If you go and look at the first complaint that he
24 signed, if you look at the second -- the first amended
25 complaint, the second amended complaint, I mean, we've come a

1 long way. But the thing has been pared down from Al Qaeda,
2 weapons, cigarettes, Lokelani Lindsey. \$866 million at one
3 point. I had the pleasure of flying to Delaware, Your Honor,
4 and at that point it was \$60 million. It has never been just
5 an injunction. And that really isn't even the point, either.
6 The point is simply Mr. Hogan has told us in depositions and
7 when he's seen us, repeatedly, that he's going to continue to
8 sue; that litigation copyright infringement cases never end;
9 and that I'm going to continue to file wave after wave after
10 wave of lawsuits against you and your clients.

11 And it's in that context -- I want to let you know
12 that he says that openly. So that when you are considering
13 whether or not to grant this permanent injunction or not, I
14 have to let you know that he has told that to us repeatedly.
15 And, quite frankly, my clients sit there, you know -- and when
16 they hear from me and I report to them about what's happened,
17 they want this to end. They don't want any part of his
18 software.

19 I take you back to where I was at closing argument.
20 1993 is a long time ago. That's over ten years ago,
21 Your Honor. And that's when this software was supposedly
22 developed. Y. Hata has the new and improved, much-improved,
23 version that we heard about that's involved. The 93 -- it
24 wasn't even shown to the jury. It's outdated. Nobody wants
25 to use it. Nobody wants to touch it. Nobody wants a part of

1 it, Your Honor, so there's just no grounds for a permanent
2 injunction at this particular time.

3 So unless the court has questions, I think that
4 under the injunction standard established in MAI, and with
5 respect to permanent injunctions, that liability has not been
6 established, and there is no continuing threat of -- no threat
7 of continuing violations by the employees. They simply do not
8 want to have anything to do with it, they don't want anything
9 further to do with Mr. Berry, and we are hopeful that, when
10 the jury comes back, that everything will end.

11 Thank you.

12 THE COURT: Okay.

13 Mr. Hogan, I'll give you three minutes.

14 MR. HOGAN: Thank you, Your Honor.

15 Your Honor, regarding my threats to go on and on
16 forever, I have sent formal offers to the PCT, before we sued
17 them, for an injunction. That's all I was asking for. And I
18 believe I sent a full drafted set of settlement documents to
19 Mr. Hosoda making the same offer. I've never gotten a
20 response from anybody.

21 Whether they are using it, Your Honor, job I.D. is
22 in their e-mails. It shouldn't be there. It's there. They
23 haven't even mentioned it. And that one hangs them. Because,
24 as I put in my moving papers, Your Honor, Mr. Dillon says, it
25 shouldn't be there, but it is. And they are making reports

1 off of it. So job I.D., which is Mr. Berry's database,
2 Mr. Dillon admits it's not in what he's created, is still
3 alive and well and living in Kapolei.

4 As to -- I asked Mr. Dillon a question in a
5 deposition. I can put him on and do it again. But there was
6 a question when he removed everything out of the FCS and made
7 original, and then he made auxiliary, he claims that auxiliary
8 is "proprietary to me," Your Honor. It's not. And that's the
9 problem. He doesn't get it. It's Mr. Berry's.

10 It was a derivative, maybe illegally, which means,
11 under Picket v Prince, he can never get ownership rights to
12 it. If it was legal, he could remove his derivative and get
13 rid of Mr. Berry's, but he has a derivative. But it was
14 illegal when it was put in there, he can never get proprietary
15 rights to it. But he thinks he can. And that's the fear.
16 That's why I'm saying, you can't leave it up to him. He says
17 in his deposition, "I did not see myself as having the
18 competence to make decisions about how we could use the
19 software or not in a way that was legitimate in the eyes of
20 the court."

21 But what we have just heard is, we are going to
22 leave it to his discretion to determine whether or not he's
23 infringing.

24 That's not fair to these other employees. To
25 Ms. Waiolama, who has never changed Mr. Berry's database --

1 unlike Ms. Noa or Ms. Rio. Mr. Dillon has to be enjoined.
2 That's the problem. And once Mr. Dillon is enjoined, this
3 will end. He is the reason that it's continued to survive.
4 He is the reason why Mr. Berry was not requested to make the
5 changes, because they had Mr. Dillon on staff to do it.

6 As to the prejudice to the PCT, I guess, Your Honor,
7 is having to come back to this court. And, yes, the court has
8 said that as to my prepetition claims and the things that I
9 got relief from stay with, Your Honor, which was prepetition
10 and post-petition, because I had to go prepetition to get
11 Judge King's order finalized, and I attempted to collect on
12 that, and she said, no. But she said, that doesn't apply to
13 the post-petition one. That's a different world, because it's
14 administrative.

15 And not only under the plan of reorganization --
16 Mr. Capozzola's got it all wrong. Regardless of my orders, if
17 there isn't enough money in the PCT, every creditor goes after
18 Core-Mark, not just Mr. Berry. The only way they got the plan
19 through was to say, all the leftovers -- and we have got the
20 PCT representative here, we could put her on -- but all the
21 leftover goes to Core-Mark.

22 As to who gets the property when it's over? I have
23 to admit, Your Honor, you'll read it. And I have been a
24 bankruptcy lawyer since the day I got out of law school, and I
25 -- you know, if they are saying somebody other than Core-Mark

1 gets these assets when the PCT is dissolved, I am just curious
2 who that is, because we don't know that entity yet. And if it
3 isn't Core-Mark, and -- for instance, the copy that
4 Mr. Capozzola had in Chicago, put this on the bankruptcy --
5 you know, the certification exam. Who would own that at the
6 end of the day? Well, does the attorney own the client's
7 property that they have in their files? I don't think any
8 attorney would claim that. So at some point it goes to the
9 client.

10 The client was reorganized and gone -- that's
11 Fleming. The only thing that survived were these entities.
12 And it's Core-Mark and a few others that still linger. One of
13 those is going to get that file that was in Mr. Capozzola's
14 office in Chicago. That's not right. You can't let 'em do
15 that.

16 The fact is, they have fought this case, Your Honor,
17 from day one. This has been an enormous case for a little
18 copyright developer in Hawaii. It's because the software
19 makes a lot of money. You heard Mr. Christensen say it was
20 necessary -- we couldn't turn it off. You heard their own
21 witness say that it was a necessity.

22 All we want is to have the market back, Your Honor.
23 I understand I've got to wrap it up, Your Honor.

24 I understand I've got to wrap it up, Your Honor.

25 As to prejudice, C & S -- if you don't enjoin C & S,

1 enjoin Mr. Miller and Ms. Noa. If you don't want to enjoin
2 the other employees, you know, frankly, don't. But as to
3 Mr. Dillon and Ms. Noa, enter the injunction today. If it's
4 binding on C & S, it will be binding because it's binding on
5 them. You don't need to separately enjoin C & S to have it
6 become effective.

7 THE COURT: Okay, thank you.

8 MR. HOGAN: Thank you, Your Honor.

9 THE COURT: Okay, I am going to take this under
10 advisement. I am assuming that my courtroom manager has
11 contact information for all of you. The way I normally do
12 this, unless there's some objection from someone, is that if I
13 get a question from the jury, I will have it faxed to wherever
14 you are, and then we will have a telephone conference call.
15 And if on the telephone we can come to an agreement about a
16 written answer to be sent back to the jury, then we'll put
17 that agreement on the record. I'll then send the written
18 answer to the jury, and I'll fax you copies of the written
19 answer that was sent to the jury that we have all agreed to.

20 If something requires us all to come into court
21 because the jury has to come back in, or whatever it is that
22 has to be in the courtroom, then, if you can stay as close to
23 the courthouse as will allow you to do that, that would be
24 appreciated.

25 Okay, so is there any objection to the procedure

1

2

3

4

5

6

7

-ooOoo-

8

I, Stephen B. Platt, Official Court Reporter,

9

United States District Court, District of Hawaii, do hereby

10

certify that the foregoing is a true and correct transcript of

11

proceedings before the Honorable Susan Oki Mollway, United

12

States District Judge.

13

14

15

16

17

18

19

20

/s/ Stephen B. Platt

21

FRIDAY, APRIL 28, 2006

STEPHEN B. PLATT, CSR NO. 248

22

23

24

25